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Nos. 82-524, 82-545, 82-551

In The

Supreme Court of the United States

OCTOBER TERM, 1982

BALTIMORE GAS AND ELECTRIC CO., *et al.*, *Petitioners*,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondents.

COMMONWEALTH OF EDISON CO., *et al.*, *Petitioners*,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and UNITED STATES OF AMERICA, *Petitioners*,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONSE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

RONALD A. ZUMBRUN
ROBERT K. BEST
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
SAM KAZMAN, *Counsel of Record*
Pacific Legal Foundation
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Pacific Legal Foundation

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Pursuant to Supreme Court Rule No. 19.6, Pacific Legal Foundation, an intervenor in the case below, submits this response in support of the petitions for certiorari in these consolidated cases.

SUMMARY OF ARGUMENT

The decision of the court of appeals affects an area of national importance—the regulation of nuclear energy. While the court below cited the proper standards of review by which to examine the action of the Nuclear Regulatory Commission (NRC), it nonetheless went far beyond those standards to invalidate the agency's rule making. Despite its disclaimers, the court has effectively substituted its judgment for that of the agency. Its decision should be reviewed by this Court.

ARGUMENT

In *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), this Court stated that "Congress has made a choice to at least try nuclear energy . . . ." *Id.* at 557. The eight-year course of this litigation makes one wonder about the extent to which that congressional choice will see the light of day.

The Atomic Energy Act declares that the "development, utilization, and control of atomic energy . . . are vital to the common defense and security." 42 U.S.C. § 2012(a). The importance of this federal policy was reemphasized by the President in his characterization of nuclear energy as "[o]ne of the best potential sources of new electrical energy supplies in the coming decade . . . ." Statement Announcing a Series of Policy Initiatives, 17 Weekly Comp. of Pres. Doc. 1101 (Oct. 8, 1981). The District of Columbia Circuit has itself previously stated that the statutory mandate to implement this policy

> "is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives."

> *Siegel* v. *Atomic Energy Commission*, 400 F.2d 778, 783 (D.C. Cir. 1968).

Another circuit similarly described NRC as being entrusted with "an unfettered mandate" to carry out these responsibilities. *Westinghouse Electric Corp.* v. *NRC*, 598 F.2d 759, 771 (3d Cir. 1979).

NRC exercised this authority in developing its Table S-3 Rules, which generically deal with the environmental impacts of the nuclear fuel cycle. A panel of the District of Columbia Circuit has now ruled that these rules, the product of a decade-long administrative effort, are invalid. As is briefly shown below, the lower court's opinion itself presents the best reasons for this Court to grant the petitions for certiorari now before it; by consistently contradicting itself in its application of judicial review standards, the lower court has so far departed from its proper role "as to warrant [this Court] granting certiorari" once again in this case. *Vermont Yankee*, 435 U.S. at 537 n.14.

1. The court of appeals stated that NRC

> "can be asked to do no more than to reveal that which it knows and that which it does not know." Opinion below, Appendix (App.) 1a, 38a.[1]

In this case NRC clearly did so, acknowledging that there were uncertain and tentative aspects to its conclusions regarding zero releases from stored wastes and regarding the probability of finding suitable storage sites. *See* opinion below, App. at 41a. The court nonethe-

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[1] "Appendix" refers to either of the identical appendices to the petitions for certiorari in No. 82-524 and in No. 82-551.

less decided that NRC's action was arbitrary and capricious, despite the established right of an agency

> "to draw conclusions . . . from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like." *Ethyl Corp.* v. *Environmental Protection Agency*, 541 F.2d 1, 28 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

Here, in fact, NRC explicitly determined that, because of other assumptions that it utilized, its approach was still a conservative one. NRC, *Final Rule* (Aug. 2, 1979), App. 341a, 370a. Yet despite NRC's admission of its uncertainties, and despite its judgment that it had more than sufficiently compensated for them, the court nonetheless rejected the agency's explanation.

2. The court of appeals admitted that an agency may engage in generic rule making which is conclusive on decision making in specific cases:

> "NEPA [the National Environmental Policy Act, 42 U.S.C. §§ 4332, *et seq.*] does not require that an agency engage in duplicative and possibly inconsistent individual determinations, but allows it, in the alternative, to conduct a single rulemaking to determine generic values to be considered together with case-specific costs and benefits in individual proceedings. [Footnote omitted]." Opinion below, App. at 43a; *see also id.* at 44a-45a.

NRC here expressly limited the conclusive effect of its rule. The agency stated that many environmental issues, such as dose commitment and health impacts, could still be addressed in individual license proceedings. *Final Rule*, App. at 376a. The court of appeals nonetheless insisted that NRC's rules contravened the consideration of environmental factors required under NEPA. Opinion below, App. at 45a-46a.

3. The court of appeals acknowledged NRC's right to "organize its decisionmaking process" to allow the consideration in individual proceedings of "only the upper bound of reasonably foreseeable environmental costs." Opinion below, App. at 51a. NRC did precisely this, determining that certain events (such as meteor strikes, the creation of new earthquake faults, or casual intrusions by humans into a waste repository) were too unlikely to require further consideration. *Final Rule*, App. at 369a-70a. Yet the court of appeals rejected this approach, unexplainedly announcing a new rule that forbids such rule making because it is "undertaken in the abstract." Opinion below, App. at 50a n.137. If this is so, then it is difficult to imagine what form of generic rule making is still possible.

4. In the opinion of the lower court, NRC's conclusions on zero release could be viewed either as factual findings or as decision-making devices. Opinion below, App. at 35a-36a. Regardless of which view one takes, the court of appeals' decision constitutes an extreme intrusion into administrative decision making.

If one regards NRC's action as a finding of fact, then that determination cannot be judicially vacated merely because the court and the agency draw "two inconsistent conclusions from the evidence." *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620 (1966). This follows from a basic rule of judicial review: a "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). This is no less true with respect to an agency's judgment of "the environmental consequences of its actions." *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

To the extent that the S-3 Rules constitute a procedural division of decision-making responsibility by NRC, their rejection by the court of appeals is proscribed by the ruling which this Court issued when it reviewed this rule making in 1978:

> "Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." ' " *Vermont Yankee*, 435 U.S. at 543 (citations omitted).

Finally, to the extent that NRC's action lies somewhere in between these two characterizations and constitutes a policy judgment regarding remote uncertainties, that action "is entitled to substantial judicial deference." *Federal Communications Commission* v. *WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). NRC has acted on the basis of "judgment and prediction rather than pure factual determinations," and the agency's explanations which accompanied the S-3 Rules constitute "rational explanation[s] for its conclusions." *Id.* at 594, 595. Its decisions are thus fully within both its "institutional competence" and its legal authority. *Id.* at 596. NRC was fully competent to address remote risks in the manner it did, and it gave a reasoned explanation for doing so. NEPA's requirement that alternatives be considered (42 U.S.C. § 4332(c)(iii)) "must be bounded by some notion of feasibility." *Vermont Yankee*, 435 U.S. at 551. Similarly, NEPA's requirement that environmental consequences be considered must be bounded by some notion of probability.

Thus, regardless of how one views the S-3 Rules, the court of appeals has gone beyond the bounds of judicial review in invalidating them.

CONCLUSION

For these reasons, and for the reasons more fully set out in the petitions for certiorari and in the dissent below of Circuit Judge Wilkey (App. at 117a-81a), the decision of the court of appeals should be reviewed by this Court.

DATED: October 15, 1982.

Respectfully submitted,

RONALD A. ZUMBRUN
ROBERT K. BEST
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
SAM KAZMAN, *Counsel of Record*
Pacific Legal Foundation
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686
Attorneys for Pacific Legal Foundation

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